

DEPARTMENT OF STATE REVENUE
LETTERS OF FINDINGS NUMBERS: 03-0147& 03-0021
Gross Retail Tax-Calculation
Gross Retail Tax-Oil Changes
Withholding Tax-Payment Application
Penalty-Request for Waiver
For Years 1999, 2000, 2001

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Retail Tax—Calculation

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; 45 IAC 15-5-3(8); 45 IAC 2.2-2-1; 45 IAC 2.2-6-8

Taxpayer protests the audit's calculation of gross retail taxes owed on sales of gasoline.

II. Gross Retail Tax—Oil changes

Authority: IC § 6-8.1-5-1(b)

Taxpayer protests the audit's assessment of gross retail tax on items used in oil changes, arguing that the audit's reliance on a single invoice does not support taxpayer's alleged failure to collect and remit the tax.

III. Withholding Tax—Payment application

Authority: IC § 6-8.1-8-1.5; 45 IAC 15-8-1

IV. Penalty—Request for waiver

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of the 10% negligence penalty and requests a waiver.

STATEMENT OF FACTS

Taxpayer is an Indiana S-corporation, selling gasoline, snacks, beverages, and performing repair work on customers' cars—engines, brakes, shocks, and suspensions. Taxpayer also does oil changes. Additional facts will be supplied as required.

I. Gross Retail Tax—Calculation

DISCUSSION

The audit determined gross retail tax liability in two areas: the calculation of gross retail taxes due on sales of gasoline and the assessment on the sale of parts used during oil changes on customers' vehicles. Taxpayer protested both items as well as a withholding liability payment that taxpayer stated was incorrectly applied. Each protested item will be taken up in order.

Pursuant to IC § 6-8.1-5-1(b) and 45 IAC 15-5-3(8), a “notice of proposed assessment is prima facie evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made.” Pursuant to IC § 6-2.5-2-1, a “person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.” *See also*, 45 IAC 2.2-2-1.

According to the audit, in connection with the calculation used to arrive at taxpayer’s gross retail tax liability for gasoline sales, taxpayer incorrectly claimed a credit of prepaid sales tax on the amount of fuel he sold, not the amount of fuel he purchased. In order to verify the amount of taxpayer’s tax liability, the audit completed worksheets that were designed to follow the ST-103MP, the sales tax return required by the Department for entities such as taxpayer. The audit used numbers found in taxpayer’s profit and loss statements and verifications of prepaid tax paid at the point of purchase. The audit then determined that the difference was taxable pursuant to 45 IAC 2.2-6-8, **not pursuant** to the rate specified on the ST-103MP. Consequently, taxpayer has incurred a substantial gross retail tax liability for sales during the audit years at issue.

At the hearing on taxpayer’s protest, with respect to this issue, taxpayer and his representative walked the hearing officer through how taxpayer figured out his actual tax liability. Taxpayer reconstituted the ST-103MP’s, using the audit’s own figures and multiplied them by the rate listed on the ST-103MP. In other words, he followed the directions on the form the Department requires for entities such as taxpayer. The audit did not accept taxpayer’s reconstituted ST-103MP’s.

Taxpayer and his representative stated at the hearing, by way of a complete walk through of a representative sample, and demonstrated, that the figures actually came from the audit worksheets. The Department concludes that taxpayer’s reconstituted ST-103MP’s, and the tax rate listed on that form, should be accepted, and taxpayer’s gross retail tax on the gasoline should be recalculated accordingly.

FINDING

Taxpayer's protest concerning the calculation of gross retail taxes owed on gasoline sales is sustained subject to audit's recalculation.

II. Gross Retail Tax—Oil changes

DISCUSSION

The audit based taxpayer's entire gross retail tax liability on a single invoice which indicated sales tax was not collected on that particular work order. By the time the audit was completed, reviewed, assessments issued, a protest received and reviewed, and a hearing set, taxpayer's limited storage capacity revealed there were no paper invoices for the audit years at issue available to back up taxpayer's protest. Taxpayer keeps paper invoices for a limited period of time in case a customer disputes a particular work order. According to taxpayer, the audit had the opportunity to review computerized invoices during the audit, but chose not to. Taxpayer's storage software periodically purges these files. The audit computed a best information available percentage, "based on a review of similar industries charging the same amount for oil changes," found in an industrial standards textbook; however, the audit did not take into account taxpayer's size, location, or the facility's age. Taxpayer's place of business is decades old, small, out-of-the-way, and nothing like a BP Connect platform/plaza facility. The audit stated no invoices were available to review for the audit years at issue, but that taxpayer had invoices for years prior to the audit years.

It appears that the audit's determination of gross retail tax liability on materials used in oil changes is arbitrary and capricious, based on very little reliable evidence. On the other hand, taxpayer no longer has the documentation to support the lack of liability.

FINDING

Taxpayer's protest concerning the gross retail tax assessment on materials used in oil changes is denied.

III. Withholding Tax—Payment application

DISCUSSION

Taxpayer's protest on this issue focuses on the fact that the payment was applied to two prior, outstanding liabilities. And not to the 1999 withholding liability, the reason taxpayer wrote the check.

Pursuant to IC § 6-8.1-8-1.5, the department applies payments in the following order:

- (1) To any penalty owed by the taxpayer.
- (2) To any interest owed by the taxpayer.

(3) To the tax liability of the taxpayer.

See also, 45 IAC 15-8-1.

When taxpayer tendered his check to the Department in 2000 to pay the 1999 withholding liability, the Revenue Processing System showed two older outstanding liabilities. Therefore, pursuant to department policy, the 2000 payment was applied to an open December 1995 Gross Retail Sales Tax liability and to an open 1998 Withholding Tax liability. Therefore, the 1999 withholding tax liability is still open.

FINDING

Taxpayer's protest concerning the perceived misapplication of the 2000 payment for the 1999 withholding tax liability is denied.

IV. Penalty—Request for waiver

DISCUSSION

Taxpayer protests the imposition of the 10% negligence penalty on the assessment.

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . ." In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer has not set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Therefore, given the totality of all the circumstances, waiver of the 10% negligence penalty is not appropriate in this particular instance.

FINDING

Taxpayer's protest concerning the proposed assessment of the 10% negligence penalty is denied.